

United States District Court
District of Massachusetts

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iNebular, Inc.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	22-10477-NMG
Deutsche Bank Trust Company)	
Americas,)	
)	
Defendant.)	

MEMORANDUM & ORDER

GORTON, J.

iNebular, Inc. ("iNebular" or "plaintiff") alleges that one of its officers was contacted by a firm which recruits cybersecurity and human resources professionals to work on projects for Deutsche Bank Trust Company Americas ("Deutsche Bank" or "defendant"). After several rounds of communication with the recruiting firm, Navitec, Inc. ("Navitec" or "the Recruiter"), that officer came to believe that iNebular had accepted an offer to work at Deutsche Bank for a period of several months. Deutsche Bank purportedly attempted to withdraw the offer after it had been accepted by iNebular.

In the amended complaint, plaintiff seeks damages for breach of contract, promissory estoppel, fraudulent and negligent misrepresentation and violations of M.G.L. c. 93A. Pending before the Court is defendant's motion to dismiss the

amended complaint for lack of personal jurisdiction and failure to state a claim. For the following reasons, the motion will be denied.

I. Background

The following facts are taken from the complaint and accepted as true for purposes of the pending motion. iNebular is a corporation headquartered in Saugas, Massachusetts and had its principal place of business in Massachusetts during the pertinent events at issue. In September, 2019, Navitec recruited iNebular to enter into a contract with Deutsche Bank and conducted interviews with iNebular's president, George Domenikos ("Domenikos"). Domenikos participated in a final interview with Deutsche Bank on September 16, 2019, and received an offer via Navitec's Leslie Woodsmith ("Woodsmith") shortly thereafter. iNebular accepted the offer on or around September 18, 2019, anticipating that the duration of the contract would be six months. It declined offers from other companies which would have conflicted with its prospective work at Deutsche Bank. In a subsequent call with the Recruiter, iNebular agreed to a September 30, 2019, start date.

The agreed-upon start date was then delayed by one week and Domenikos was informed that Jennifer Campbell ("Campbell"), a cybersecurity employee at Deutsche Bank, would conduct another interview. Domenikos agreed to the new interview with the

understanding that it would have no effect on the contract offer which he had already accepted. The start date for iNebular was postponed for another week and Domenikos had his interview with Campbell whereupon, on October 14, 2019, Navitec informed him that Deutsche Bank had withdrawn its offer.

On March 1, 2022, iNebular filed suit against Deutsche Bank in the Massachusetts Superior Court for Suffolk County. Defendant removed the case to this Court under 28 U.S.C. § 1441(a) on grounds of diversity jurisdiction. Deutsche Bank moved to dismiss the complaint in late April, 2022, after which iNebular filed an amended complaint. On June 22, 2022, defendant sought to dismiss plaintiff's amended complaint in the motion now pending before the Court.

II. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the subject pleading must contain sufficient factual matter to state a claim for relief that is actionable as a matter of law and "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the court can draw the reasonable inference that the defendant

is liable for the misconduct alleged. Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011).

When rendering that determination, a court may consider certain categories of documents extrinsic to the complaint “without converting a motion to dismiss into a motion for summary judgment.” Freeman v. Town of Hudson, 714 F.3d 29, 36 (1st Cir. 2013) (citing Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). For instance, a court may consider documents of undisputed authenticity, official public records, documents central to a plaintiff’s claim and documents that were sufficiently referred to in the complaint. Watterson, 987 F.2d at 3.

A court may not disregard properly pled factual allegations in the complaint even if actual proof of those facts is improbable. Ocasio-Hernandez, 640 F.3d at 12. Rather, the court’s inquiry must focus on the reasonableness of the inference of liability that the plaintiff is asking the court to draw. Id. at 13.

B. Agency

The resolution of many of the issues raised in defendant’s motion to dismiss depends upon whether the Recruiter was acting as defendant’s agent. The Court will therefore begin by evaluating whether iNebular has adequately pled facts to demonstrate that Navitec was the agent of Deutsche Bank. For

the following reasons, the Court finds that plaintiff's allegations with respect to the existence of an agency relationship are sufficient at this stage of the proceedings.

The "essential ingredients" of a principal-agent relationship under Massachusetts law are:

- 1) the agent's power to alter the legal relationships between the principal and third parties; 2) a fiduciary relationship toward the principal regarding matters within the scope of the agency; and 3) the principal's right to control the agent's conduct in matters within the scope of the agency.

CNE Direct, Inc. v. Blackberry Corp., 821 F.3d 146, 150 (1st Cir. 2016) (citation omitted) (noting that Massachusetts follows the Second Restatement of Agency).

The conduct of an agent with respect to a third party is imputed to its principal if the agent acts with actual or apparent authority or if the principal ratifies the agent's conduct. See Merrimack Coll. v. KPMG LLP, 480 Mass. 614, 619-20, 108 N.E.3d 430, 437 (Mass. 2018). The determination of whether there was an agency relationship is typically "a question of fact for the jury" in Massachusetts. White's Farm Dairy, Inc. v. De Laval Separator Co., 433 F.2d 63, 66 (1st Cir. 1970). Thus, a plaintiff meets its burden at the motion to dismiss stage if it pleads facts sufficient to support the finding of such a relationship. See, e.g., Focused Impressions, Inc.

v. Sourcing Grp., LLC, 19-CV-11307, 2020 U.S. Dist. LEXIS 43870, at *12-13 (D. Mass. Mar. 13, 2020).

The amended complaint contains specific allegations sufficient to support a finding that Deutsche Bank was the principal and Navitec its agent. iNebular claims that Deutsche Bank uses Navitec to recruit cybersecurity and human resources personnel to work for it under contract. According to plaintiff, the Recruiter reached out on behalf of defendant and eventually relayed an offer to contract with Deutsche Bank. Plaintiff accepted the offer and agreed to a start date with the understanding that its contract was with defendant via the Recruiter. Despite that purported offer and acceptance, Deutsche Bank conducted an additional interview after the original start date and then, through Navitec, rescinded its offer. Taken together, these allegations are sufficient to support a finding that plaintiff has stated a claim that Navitec was acting as the agent for Deutsche Bank in its interactions with iNebular.

C. Personal Jurisdiction

In order for the Court to exercise personal jurisdiction over Deutsche Bank, a non-resident defendant, the exercise of jurisdiction must comport with the Massachusetts long-arm statute and constitutional due process requirements. Because

its personal jurisdiction over defendant has been challenged,
the Court will use the prima facie standard and

take specific facts affirmatively alleged by the
plaintiff as true (whether or not disputed) and
construe them in the light most congenial to the
plaintiff's jurisdictional claim.

Mass. Sch. of Law v. ABA, 142 F.3d 26, 34 (1st Cir. 1998)

(quoting Ticketmaster-New York v. Alioto, 26 F.3d 201, 203 (1st
Cir. 1994)). Uncontradicted facts averred by the defendant are
“add[ed] to the mix”. Id. The ultimate burden of demonstrating
that jurisdiction exists rests with the plaintiff. Id.

1. The Massachusetts Long-Arm Statute

The Massachusetts long-arm statute provides for the
exercise of personal jurisdiction over

a person, who acts directly or by an agent, as to a
cause of action in law or equity arising from the
person's:

[. . .]

(c) causing tortious injury by an act or omission in
this commonwealth;

(d) causing tortious injury in this commonwealth by
an act or omission outside this commonwealth if he
regularly does or solicits business, or engages in any
other persistent course of conduct, or derives
substantial revenue from goods used or consumed or
services rendered, in this commonwealth;

(e) having an interest in, using or possessing real
property in this commonwealth[.]

M.G.L. c. 223A § 3 (emphasis added).

The Massachusetts Supreme Judicial Court has held that “courts should consider the long-arm statute” before analyzing whether the exercise of jurisdiction comports with constitutional requirements. SCVNGR, Inc. v. Punchh, Inc., 478 Mass. 324, 330, 85 N.E.3d 50, 56 (Mass. 2017). In support of its motion to dismiss, defendant assumes that the Recruiter was not acting as its agent and thus contends there is no personal jurisdiction over it under Massachusetts law. But apart from the conclusory assertion that Navitec was a third-party not under its control, Deutsche Bank fails to proffer any facts “to the mix”, Mass. Sch. Of Law, 142 F.3d at 34, which would refute the existence of an agency relationship.

Plaintiff rejoins that Navitec’s actions should be imputed to Deutsche Bank and avers that jurisdiction exists under subsections (c), (d) and/or (e) of the long-arm statute. Because iNebular has alleged specific facts in support of the existence of an agency relationship between Deutsche Bank and Navitec, the Court finds there are grounds for personal jurisdiction in this matter under M.G.L. c. 223A § 3(c).

Plaintiff has alleged that defendant, directly and through the Recruiter, communicated false and misleading statements into Massachusetts which resulted in tortious injury within the Commonwealth. Courts have held that such conduct is sufficient

to bring a defendant within the scope of jurisdiction conferred by § 3(c). See Murphy v. Erwin-Wasey, Inc., 460 F.2d 661, 664 (1st Cir. 1972) (holding that a defendant which sends a false statement into a state "intending that it should there be relied upon to the injury of a resident of that state" has acted within the receiving state under § 3(c)); NRO Bos., LLC v. Yellowstone Capital LLC, 18-CV-10060, 2020 U.S. Dist. LEXIS 177186, at *15-16 (D. Mass. Sep. 28, 2020) (same). Plaintiff has therefore alleged adequate facts to demonstrate that defendant caused tortious injury by an act or omission in Massachusetts. See Scuderi Grp., LLC v. LGD Tech., LLC, 575 F. Supp. 2d 312, 320-21 (D. Mass. 2008) (holding that injuries in Massachusetts resulting from fraud, misrepresentations and violations of Chapter 93A are sufficient to confer personal jurisdiction).

The Court notes that recent decisions have held there is no "tortious injury" within the meaning of the Massachusetts long-arm statute when "only monetary damages are sought and those damages 'are grounded in a breach of contract.'" Dennis Grp., Inc. v. Nestle Purina Pet Care Co., 22-CV-30015, 2022 U.S. Dist. LEXIS 119448, at *8 (D. Mass. Mar. 29, 2022) (quoting Roberts v. Legendary Marine Sales, 447 Mass. 860, 864, 857 N.E.2d 1089, 1092 (Mass. 2006)); see also Filmore v. VSP N. Am., LLC, 18-CV-10256, 2019 U.S. Dist. LEXIS 6389, at *18-20 (D. Mass. Jan. 14, 2019). The underlying decision of the Massachusetts Supreme

Judicial Court in Roberts concerned alleged misrepresentations by the defendant which were the "but for" cause of the plaintiff executing a contract for the purchase of a boat. Roberts, 857 N.E.2d at 1092. Subsequent state court decisions in Massachusetts have emphasized that the tortious conduct in Roberts precipitated the formation of a contract from which the plaintiff's injuries arose. See, e.g., Mongiardo v. Private Collection Motors, Inc., 100 Mass. App. Ct. 1117, 179 N.E.3d 1133 (Mass. App. Ct. 2021); Bos. Fashion Publ'g, Inc. v. Indus. Publ'ns, LLC, 86 Mass. App. Ct. 1114, 17 N.E.3d 1119 (Mass. App. Ct. 2014).

The amended complaint in the case at bar, however, alleges that the representations sent by Deutsche Bank and its agent into Massachusetts were false as to whether an offer had been made or a contract formed. For instance, iNebular alleges, inter alia, that such representations caused it to "persist for weeks in the false belief that it had been offered a job." Thus, at least a portion of the monetary damages claimed by iNebular, which include lost wages and business opportunities, arose directly from Deutsche Bank's purported tortious conduct rather than from the breach of a contract which may not have existed. Thus, although the allegations here refer to a potential breach of contract, the "substance of the plaintiff's complaint", Roberts, 857 N.E.2d at 1092, and the damages claimed

are not entirely contractual and plaintiff has adequately alleged it suffered a tortious injury in Massachusetts as required by M.G.L. c. 223A § 3(c).

2. Constitutional Requirements for the Exercise of Specific Jurisdiction

Constitutional due process requires that a defendant has certain minimum contacts with the forum state such that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (cleaned up). The First Circuit Court of Appeals has recognized three aspects of the minimum contacts analysis with respect to the exercise of specific jurisdiction: (1) the underlying claims asserted against the defendant must be related to its activities in the forum state, (2) the defendant must have purposefully availed itself "of the privilege of conducting activities in the forum state" and (3) the exercise of jurisdiction must be reasonable. Adelson v. Hananel, 510 F.3d 43, 49 (1st Cir. 2007). All three elements are satisfied here.

First, there is a demonstrable nexus between plaintiff's claims in the amended complaint and the "specific contacts between the defendant and the forum state." Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995). Although defendant contends that it did not conduct activity within Massachusetts, the

amended complaint alleges numerous instances in which defendant or its purported agent directed communications into the Commonwealth which affected conduct and caused injury here.

Furthermore, defendant's pertinent contacts with Massachusetts satisfy the two key pillars of purposeful availment: voluntariness and foreseeability. See N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 25-26 (1st Cir. 2005) (finding the requirement of purposeful availment was met where the defendant knew his statements would likely induce reliance and cause injury in the forum state). Deutsche Bank and its purported agent, Navitec, "deliberately target[ed] its behavior towards the society or economy of a particular forum", Carreras v. PMG Collins, LLC, 660 F.3d 549, 555 (1st Cir. 2011), by communicating allegedly false and misleading statements to iNebular during the process of recruiting, interviewing and negotiating. Defendant denies that the Recruiter was acting as its agent, referring to Navitec as a "third-party" which acted without direction from Deutsche Bank, but cannot avoid the implications of an adequately pled agency relationship for purposes of the pending motion.

Finally, the reasonableness of exercising jurisdiction in this matter, as illuminated by consideration of the gestalt factors, also weighs in favor of finding specific jurisdiction here. The five gestalt factors are:

(1) the defendant's burden of appearing [in the forum], (2) the [forum's] interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Plixer Int'l v. Scrutinizer GmbH, 905 F.3d 1, 12 (1st Cir. 2018) (quoting Ticketmaster, 26 F.3d at 209).

The burden on the defendant of appearing in Massachusetts is, although present, not a determinative factor in the absence of "some kind of special or unusual burden." eIQnetworks, Inc. v. BHI Advanced Internet Sols., Inc., 726 F. Supp. 2d 26, 35 (D. Mass. 2010) (citation omitted). As to the second factor, plaintiff is located in Massachusetts and was located here throughout the course of the events alleged in this case. Furthermore, Massachusetts has an interest in adjudicating claims which are alleged to have had their most significant impact here. See Adams v. Gissell, 20-CV-11366, 2021 U.S. Dist. LEXIS 257758, at *18 (D. Mass. Dec. 8, 2021) ("the forum state has a significant interest in adjudicating a dispute when defendants caused tortious injury within its borders").

For the third factor, plaintiff's choice of a forum is "accorded a degree of deference with respect to the issue of its own convenience." Sawtelle, 70 F.3d at 1395. There appears to

be no strong interest with respect to the efficiency of the judicial system or to social policy which would affect the fourth or fifth factors of the analysis. Thus, the gestalt factors are either neutral or slightly in favor of personal jurisdiction and therefore do not demonstrate that it would be fundamentally unfair to exercise it. See, e.g., Ticketmaster, 26 F.3d at 209 (holding that the gestalt factors "are not ends in themselves, but they are, collectively, a means of assisting courts in achieving substantial justice").

D. Failure to State a Claim

In its amended complaint, iNebular asserts five claims against Deutsche Bank arising out of the communications and alleged job offer: breach of contract (Count I), promissory estoppel (Count II), fraudulent and negligent misrepresentation (Counts III and IV) and violations of M.G.L. c. 93A (Count V). Defendant has moved to dismiss each of plaintiff's claims on the following grounds.

1. Breach of Contract

Deutsche Bank asserts that iNebular's claim for breach of contract should be dismissed because the job offer was made by Navitec and there are no allegations to support the existence of an agency relationship. For the reasons already discussed, it is reasonable to infer from the amended complaint that the Recruiter was acting as defendant's agent and that a contract

was negotiated between iNebular and Deutsche Bank. The motion to dismiss will be denied as to Count I.

2. Promissory Estoppel

In order to state a claim for promissory estoppel, a plaintiff must plead three essential elements:

(1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission

Anzalone v. Admin. Office of the Trial Court, 457 Mass. 647, 661, 932 N.E.2d 774, 786 (Mass. 2010) (citation omitted). The reliance of a plaintiff on the alleged promise must be reasonable. See Coll v. PB Diagnostic Sys., 50 F.3d 1115, 1124 (1st Cir. 1995) (quoting Hall v. Horizon House Microwave, 24 Mass. App. Ct. 84, 506 N.E.2d 178, 184 (Mass. App. Ct. 1987)).

Defendant submits that plaintiff's reliance on the alleged promise of employment was unreasonable in light of the lack of direct communication between the parties. That argument is unavailing. iNebular alleges that it engaged in multiple interviews with Navitec and with Deutsche Bank, accepted an offer to perform services and discussed and agreed upon a start date. Such communications with defendant and defendant's purported agent are sufficient to find that plaintiff's reliance on the seemingly unambiguous offer of employment was reasonable. See also Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43,

59, 809 N.E.2d 1017, 1031 (Mass. 2004). Thus, the Court will not dismiss plaintiff's claim of promissory estoppel.

3. Fraudulent and Negligent Misrepresentation

Deutsche Bank reprises its argument that it did not "directly" communicate an offer of employment or other promise to iNebular. Navitec did, however, allegedly communicate such an offer to iNebular. In light of the Court's previous conclusion with respect to the existence of an agency relationship, the motion to dismiss will be denied as to Counts III and IV.

4. M.G.L. c. 93A § 11

There are three elements of a Chapter 93A claim brought under Section 11 between parties engaged in the conduct of any trade or commerce:

(1) the defendant engaged in an unfair method of competition or committed an unfair deceptive act or practice; (2) a loss of money or property was suffered; and (3) the defendant's unfair or deceptive method, act or practice caused the loss suffered.

Anoush Cab, Inc. v. Uber Techs., Inc., 8 F.4th 1, 16 (1st Cir. 2021) (citation omitted).

Furthermore, the complained-of conduct must have occurred "primarily and substantially" in Massachusetts. M.G.L. c. 93A § 11; Kuwaiti Danish Comput. Co. v. Dig. Equip. Corp., 438 Mass. 459, 473, 781 N.E.2d 787, 799 (2003) (explaining that courts should eschew a set of rigid factors and instead evaluate

whether the “center of gravity of the circumstances that give rise to the claim” was within Massachusetts). Although Deutsche Bank notes this requirement in support of its motion to dismiss, it does not dispute this element. See M.G.L. c. 93A § 11 (“[T]he burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.”).

The evaluation of whether there was an actionable unfair act or practice comprising a violation of Chapter 93A depends upon:

(1) whether the conduct is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers or other businesses.

H1 Lincoln, Inc. v. S. Wash. St., LLC, 489 Mass. 1, 14, 179 N.E.3d 545, 557 (Mass. 2022) (cleaned up).

Defendant argues that a breach of contract alone does not comprise an actionable unfair act or practice. It is correct that a claim for the violation of Chapter 93A premised on a breach of contract must allege some additional “extortionate quality” such as use of the breach, or threat thereof, to extract an unbargained-for benefit. Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 226, 598 N.E.2d 666, 670 (Mass. App. Ct.

1992); see also Formulatrix, Inc. v. Rigaku Automation, Inc., 15-CV-12725, 2016 WL 8710448, at *3 (D. Mass. Apr. 1, 2016).

In the case at bar, however, iNebular has alleged violations of Chapter 93A which do not arise solely from Deutsche Bank's purported breach of contract. It has also based its claim upon, inter alia, alleged negligent and fraudulent misrepresentation. See, e.g., Marram, 809 N.E.2d at 1032-33 (holding that an extreme or egregious negligent misrepresentation may constitute a violation of Chapter 93A and thus the claim at issue should not have been dismissed).

Determining the boundaries of what may qualify as a violation of Chapter 93A is a question of law but the determination with respect to a particular practice or set of actions is a question of fact. See Ahern v. Scholz, 85 F.3d 774, 797 (1st Cir. 1996) (citation omitted). Here, plaintiff has asserted claims that fall within the boundaries of Chapter 93A as a matter of law. See Zayre Corp. v. Computer Sys. of Am., Inc., 24 Mass. App. Ct. 559, 511 N.E.2d 23, 30 n.23 (Mass. App. Ct. 1987) (holding that "conscious misrepresentation" may be so unfair and deceptive as to constitute a violation of Chapter 93A § 11). Whether the precise facts underlying iNebular's claims constitute unfair or deceptive conduct on behalf of Deutsche Bank is a factual question not subject to disposition at this

stage. Thus, dismissal of iNebular's claim for violations of Chapter 93A is improper.

ORDER

For the foregoing reasons, the motion to dismiss of defendant for lack of personal jurisdiction and failure to state a claim (Docket No. 18) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: January 17, 2023